MOTION FILED
NOV 28 1988

No. 88-733

In The
Supreme Court of the United States

October Term, 1988

UNITED ARTISTS THEATRE CIRCUIT, INC. AND AMERICAN MULTI-CINEMA, INC.,

Petitioners,

v.

HARKINS AMUSEMENT ENTERPRISES, INC. AND DANIEL E. HARKINS d/b/a TOWER PLAZA CINEMA I AND II,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

MOTION OF CERTAIN MOTION PICTURE DISTRIBUTORS FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE

LEWIS AND ROCA

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Distributor Defendants-Appellees

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This case arises from a Ninth Circuit Court of Appeals opinion in *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477 (9th Cir. 1988), an action brought by a motion picture exhibitor against two groups of defendants. The first is a group of exhibitors, and second a group of motion picture distributors. Certain motion picture exhibitors have filed a petition for certiorari in this Court. The distributors have not done so. The specific distributors involved are Columbia Pictures Industries, De Laurentiis Entertainment Group (formerly Avco Embassy), Paramount Pictures Corp., Twentieth Century-Fox Film Corp., Universal City Studios, Warner Bros. Distributing Corp. and United Artists Corp.

The decision of the district court was affirmed in part and reversed in part by the court of appeals, and the matter was remanded for further proceedings. Certain statements made in the petition for certiorari by the exhibitors the distributors believe are both inaccurate as a matter of the record and prejudi-

cial to their interests. Without taking any position on the merits of the petition for certiorari, the distributors ask leave to file this brief amicus so that if certiorari is granted and the matter is further considered here, the Court will not be misled in the particulars specified in the attached brief amicus statement.

The distributors have asked leave of the exhibitor defendants and the exhibitor plaintiff for consent to file this brief. Neither has consented. We, therefore, as parties to the underlying action, ask leave pursuant to Rule 36 to file this statement to fend off what we regard as severe prejudice.

RESPECTFULLY SUBMITTED this _____ day of November, 1988.

LEWIS AND ROCA

By _____
John P. Frank

Counsel of Record for Certain
Distributor Defendants-Appellees

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BRIEF AMICUS CURIAE OF CERTAIN MOTION PICTURE DISTRIBUTORS

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Respondents.

The distributors identified in the motion above object to certain statements made by the petitioning exhibitors. The statements relate to an economic phenomenon known as "the split" in the motion picture industry, a practice of agreement among certain exhibitors that only one will submit a bid to the distributors on a given film. This practice by exhibitors is highly inimical to the interests of distributors who have litigated against it in other cases. In the instant case, the Ninth Circuit Court of Appeals expressly found that while there was a split in the Phoenix, Arizona market among the exhibitors, there was no horizontal agreement among the distributors to cooperate with the split. The exact language of the court from which the petition is taken is:

> We emphasize that our reversal on this claim is limited to the alleged horizontal combination by the exhibitors and the vertical agreement between split members and *in-*

> *dividual* distributors. No evidence of a conspiracy *between* any distributors was presented, and Harkins may not pursue this theory on remand.

850 F.2d at 485 (emphasis the Court's).

In short, the court from which the petition is taken expressly found that the only claim exhibitor plaintiff could make so far as the distributors were concerned was the possibility of individual conspiracies between particular distributors and particular exhibitors and there was no holding that in truth even such vertical conspiracies existed; the holding was solely one of remand because factual issues had been raised which were not appropriately disposed of on summary judgment.

> 1. The first question presented by the exhibitors here is:
> Whether motion picture splits open to all exhibitors in a market and operating with the knowledge and participation of motion picture distributors should be condemned illegal *per se*. . . .

This question presented assumes that the splits were operating with the "participation of motion picture distributors." The court below did not so hold and the assertion is contrary to fact.

2. The petition at p. 2 asserts, "This petition focuses upon the independent decisions of certain motion picture distributors to license their movies through an orderly allocation of negotiation rights among exhibitors rather than by competitive bidding." The decision of the court below did not so hold and the assertion is contrary to fact.

3. The petition, p. 7, asserts that "The record reveals only that certain distributors preferred to license their films through the split's allocation of negotiation rights rather than by competitive bidding. . . ." The court below did not so hold and the assertion is contrary to fact.

CONCLUSION

This Court should reach its conclusion as to this petition for certiorari unencumbered by any belief that distributors have chosen, encouraged, or participated in splits. As has often been held, the distributors are the victims of splits, not their origina-

tors. A leading case on splits and the relation of distributors to them is *United States v. Capitol Service, Inc.*, 568 F. Supp. 134 (E.D. Wis. 1983), *aff'd*, 756 F.2d 502 (7th Cir.), *cert. denied*, 474 U.S. 945 (1985). As the district court noted in that case, 568 F. Supp. at 144 n.7, "[T]he defendants conceded that the distributors were opposed to the split."

RESPECTFULLY SUBMITTED this _____ day of November, 1988.

LEWIS AND ROCA

By _____
John P. Frank
Counsel of Record for Certain
Distributor Defendants-Appellees

THREE COPIES of the foregoing Motion for Leave, and Brief Amicus Curiae were mailed this _____ day of November, 1988, to:

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All parties required to be served
have been served.

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